

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO**

JENNIFER L. MILLER, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
MICHAEL J. ANDERSON, <i>et al.</i> ,	)	Judge John R. Adams
	)	
Defendants,	)	Case No. 5:20-cv-01743-JRA
	)	
and	)	
	)	
FIRSTENERGY CORP.,	)	
	)	
Nominal Defendant.	)	

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
JOINT MOTION TO DISMISS WITH PREJUDICE**

On April 12, 2024, this Court entered an order, taking “judicial notice of the fact that the appeal has been completed,” and directing the parties to present any additional argument or information to the Court. Dkt. No. 454. Pursuant to that Order, the undersigned parties jointly submit this supplemental memorandum and respectfully request that the Court dismiss this Action with prejudice.<sup>1</sup>

**I. RELEVANT BACKGROUND**

The allegations underlying this Action and the Action’s procedural background have been discussed in detail in prior submissions to the Court, including the Joint Motion to Dismiss with Prejudice filed on August 24, 2022. *See* Dkt. No. 353. This supplemental memorandum

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<sup>1</sup> Capitalized terms not otherwise defined herein have the meanings ascribed to them in the parties’ Joint Motion to Dismiss with Prejudice, Dkt. No. 353.

therefore sets forth only the background and additional developments responsive to the Court’s April 12 Order and relevant to the relief sought by the parties.

On August 23, 2022, the U.S. District Court for the Southern District of Ohio granted final approval of the Settlement, dismissed the derivative action pending in the Southern District with prejudice, and entered judgment as to all claims and parties. Dkt. Nos. 353-1 (Final Approval Order) & 353-2 (Final Judgment). In the Final Approval Order, the Southern District overruled objections by Todd Augenbaum, the proposed intervenor here. Dkt. No. 353-1 at 16. Augenbaum then filed a motion to reconsider, which the Southern District denied on May 22, 2023. *Emps. Ret. Sys. of the City of St. Louis v. Jones*, No. 2:20-cv-04813 (S.D. Ohio) (the “Southern District Action”), Dkt. No. 205.

On June 16, 2023, Augenbaum appealed, arguing that the Southern District erred in approving the Settlement. *Emps. Ret. Sys. of the City of St. Louis v. Jones*, No. 23-3512 (6th Cir.) (the “Sixth Circuit Appeal”), Dkt. Nos. 1, 52. On September 29, 2023, this Court stayed the Action pending completion of the Sixth Circuit Appeal. Dkt. No. 451.

On February 16, 2024, the Sixth Circuit issued its decision affirming the judgment of the Southern District. Sixth Circuit Appeal, Dkt. No. 77-1 (the “Opinion and Judgment,” attached as Appendix A hereto). It determined that “Augenbaum forfeited each of his appellate arguments by raising them for the first time in his motion for reconsideration or on appeal and has provided no justification for entertaining them despite the forfeiture.” *Id.* at 6. The Sixth Circuit nevertheless addressed Augenbaum’s objections and rejected each one, concluding that they were “without merit.” *Id.* at 14. Among other things, the Sixth Circuit found that the first-to-file doctrine did not preclude the Southern District from considering and approving the Settlement; it

also concluded that the Settlement did not require separate approval proceedings in every court where the derivative cases were filed. *Id.* at 12–13.

## II. ARGUMENT

In light of the Southern District’s Final Approval Order and Final Judgment, this Action should be dismissed with prejudice. The Sixth Circuit’s Opinion and Judgment affirming the Southern District’s decision further compels dismissal.

**First**, the Final Judgment, now affirmed by the Sixth Circuit, has *res judicata* effect. Each of the four elements for *res judicata* are indisputably satisfied here: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their “privies”; (3) an issue in the subsequent action that was litigated or that should have been litigated in the prior action; and (4) an identity of the causes of action. *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992). See also Dkt. No. 353-1 at 26 (providing a more detailed discussion of the application of the elements of *res judicata* to the Action).

The Southern District, indisputably a court of competent jurisdiction, entered Final Judgment dismissing all claims with prejudice, which is a final decision on the merits. See Dkt. No. 353-2, ¶ 7 (ordering that “[a]ll claims asserted in the Southern District Action are hereby dismissed with prejudice”); *Thompson v. Love’s Travel Stops & Country Stores, Inc.*, 748 F. App’x 6, 11 (6th Cir. 2018) (“A dismissal labeled ‘with prejudice’ signals a final judgment on the merits with preclusive effect.”). The Sixth Circuit has now affirmed that final judgment on the merits.

The other three elements are likewise met. The parties in this Action are nearly identical to those in the Southern District Action: both actions are derivative suits brought for the benefit of FirstEnergy by Plaintiffs as FirstEnergy stockholders, and both assert claims against virtually

the same defendants. *See* Dkt. No. 353 at 9. Both actions are premised on identical factual allegations stemming from the alleged bribery scandal involving former Speaker Householder and HB6 and present nearly identical claims on behalf of FirstEnergy. *See id.* at 9, 12; *see also* Opinion and Judgment at 1 (“Shareholders of FirstEnergy Corporation filed this derivative action against current and former FirstEnergy executives to mitigate losses from the Company’s role in the ‘HB6 Scandal’”).

Even Augenbaum does not dispute the *res judicata* effect. He has conceded that the Final Judgment has preclusive effect on the claims asserted in this Action and that, in light of the Final Approval Order, he and other shareholders cannot continue litigation of those claims. Southern District Action, Dkt. No. 181 at 13.

Because, as demonstrated above and in the Joint Motion to Dismiss, this Action is barred by the Final Judgment—which now has been affirmed by the Sixth Circuit—the Action must be dismissed with prejudice.<sup>2</sup>

**Second**, independent of *res judicata*, this Action should be dismissed with prejudice because the claims asserted in this Action are extinguished by the express terms of the court-approved Settlement. The Settlement’s releases encompass all claims asserted here. Dkt. No. 353-1 at 10-11; Dkt. No. 353-2, ¶¶ 9, 11. When the time to file a petition for certiorari expires on May 16, 2024, those releases will be effective by operation of the Settlement’s terms to fully

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<sup>2</sup> Augenbaum’s objections to the Settlement also are barred by *res judicata*. All of his objections were presented to the Southern District and were adjudicated in the Final Approval Order, *see* Dkt. No. 353-1, and in the denial of Augenbaum’s motion for reconsideration, Southern District Action, Dkt. No. 205 at 8; *see also* Opinion and Judgment at 10–11 (noting that the Southern District considered Augenbaum’s objections, though belated, at the motion for reconsideration stage). The Sixth Circuit now also has concluded that Augenbaum’s objections are “without merit.” Opinion and Judgment at 14.

and finally extinguish all claims here.<sup>3</sup> *See, e.g., Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1209 (6th Cir. 1992) (approving release of derivative claims, including unknown claims, over shareholder objection); Opinion and Judgment at 8–11, 14 (affirming approval of the Settlement and rejecting objection to description of release).

**Third**, because this Action is barred by *res judicata* and the claims are extinguished by the Settlement, there is no basis for the Court to address any other pending motion, all of which should therefore be denied as moot. The Court has not yet decided Augenbaum’s motion to intervene, with good reason—the approval of the Settlement and the Settlement itself render that motion futile and the other relief sought by Augenbaum moot. *See* Dkt. Nos. 359, 360, 361. Specifically, there is only one claim in Augenbaum’s proposed complaint-in-intervention—a claim against non-party Clearsulting LLC—that is even arguably not barred by *res judicata* or not within the scope of the Settlement’s releases; all other proposed claims are against the Defendants (*see* Dkt. No. 360 at 8 n.2) and are identical to those asserted in this Action, which the Court already found are “substantively identical” to the claims in the Southern District Action that have been dismissed with prejudice (*id.* at 8; *see also* Dkt. No. 117 at 1). Any potential claim against Clearsulting LLC should be pursued, if at all, in a separate action, and not in this Action, where all of the current claims are subject to dismissal with prejudice. Augenbaum’s motion, and all other pending motions, should therefore be denied as moot and this Action should be dismissed with prejudice.

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<sup>3</sup> The releases become effective upon the “Effective Date,” Dkt. No. 353-2, ¶ 9, which, in relevant part now that the Sixth Circuit has affirmed, will be May 16, 2024, when the time to file a petition for a writ of certiorari expires (assuming a petition, if filed, would be denied). On April 18, 2024, counsel for Augenbaum advised that Augenbaum does not intend to file a petition for a writ of certiorari.

### III. CONCLUSION

For the foregoing reasons and those set forth in the parties' Joint Motion to Dismiss with Prejudice, the parties request that the Court dismiss this Action with prejudice and that all other pending motions be denied as moot.

Dated: April 25, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed electronically on April 25, 2024. Notice of this filing will be sent to all electronically registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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